

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

FAYE BIBEE FRIEDMAN,	:
	: C.A. No. K14L-04-043 WLW
Plaintiff,	:
	:
v.	:
	:
ZAHID ASLAM, BIBEE, LLC, a	:
Delaware Limited Liability Company	:
and PHOENIX BEHAVIORAL	:
HEALTH SERVICES, INC., a	:
Delaware corporation,	:
	:
Defendants.	:

Submitted: October 24, 2014

Decided: January 2, 2015

ORDER

Upon Plaintiff's Motion to Dismiss Counterclaim and
Plaintiff's Motion to Dismiss Amended Counterclaim.
Denied.

Stephen E. Smith, Esquire of Baird Mandalas Brockstedt, LLC, Dover, Delaware,
attorney for Plaintiff.

James P. Hall, Esquire of Phillips Goldman & Spence, P.A., Wilmington, Delaware,
former attorney for Defendants.

WITHAM, R.J.

Before this Court is the Plaintiff's Motion to Dismiss Defendants' Counterclaim and Plaintiff's Motion to Dismiss Defendants' Amended Counterclaim. Both parties failed to provide any legal authority to support their positions in the amended pleadings or motions. The Defendants failed to adhere to proper court procedure when filing its amended counterclaim with respect to proper deadlines. However, the Plaintiff filed a response to the improperly filed amended counterclaims, and did not claim any undue burden. As such, the Court will consider the motions.

An ancillary matter in this litigation is the representation of Zahid Aslam, as well as the other named Defendants, Bibee, LLC, and Phoenix Behavioral Health Services, Inc. Through the entirety of litigation and through the argument of the Plaintiff's motion to dismiss counterclaim, James P. Hall has represented the Defendants. On December 12, 2014, this Court heard his motion to withdraw as counsel due to differences between counsel and defendant. This Court granted the motion, and gave Defendants sixty (60) days to retain new counsel. To date the Defendants have not retained new counsel, however a substantial amount of time remains for them to do so. This matter, as presented, is nevertheless ripe for decision.

FACTUAL BACKGROUND

On April 23, 2014, Faye Bibee Friedman (hereinafter "Plaintiff") filed a complaint with the Court alleging claims against Zahid Aslam (hereinafter "Defendant" or "Aslam"), Bibee, LLC (hereinafter "Bibee"), and Phoenix Behavioral Health Services, Inc. (hereinafter "Phoenix Behavioral"). Plaintiff brings claims

against Aslam, alleging that he is personally obligated to repay Plaintiff, and also that he breached the terms of the agreement with Bibee and Phoenix Behavioral. Plaintiff also alleges that Phoenix Behavioral breached an Unsecured Note, resulting in damages to Plaintiff. Lastly, Plaintiff asserts that Bibee's failure to make payments according to the terms of a Secured Note resulted in damages to Plaintiff, and that Defendant has been unjustly enriched by the acquisition of Bibee and Phoenix Behavioral, because Defendant has not adequately compensated Plaintiff.

On July 13, 2013, Defendant Zahid Aslam entered into a contract with Plaintiff and her husband for \$550,000 in exchange for 100% interest in Bibee. This required Defendant to assume a loan by TD Bank, to pay \$25,000 at closing, to pay \$25,000 on September 15, 2013, and to deliver a Secured Note to Plaintiff in the amount of \$209,000, payable over sixty months. Plaintiff states that the Defendant delivered a promissory note in the amount of \$209,000 to Plaintiff's husband. Defendant executed and delivered to Plaintiff a mortgage on land as security for the Promissory Note, recorded on May 16, 1983.

On July 13, 2013, Defendant Zahid Aslam entered into another contract with Plaintiff and Plaintiff's husband, where Defendant paid \$175,000 in exchange for 100% of shares of Phoenix Behavioral. This required Defendant to pay \$25,000 on November 25, 2013, to pay \$25,000 on January 15, 2014, and for Phoenix Behavioral to execute an unsecured note to Plaintiff's husband in amount of \$125,000, payable over 24 months.

In July of 2013, Plaintiff's husband passed away, leaving Plaintiff with sole

interest in the previously mentioned instruments. Plaintiff alleges that Defendant: failed to make a \$25,000 payment due under the Bibee Contract, failed to make payments on the \$209,000 Secured Note, ceased making payments on the loan from TD bank in January of 2014, and failed to make any payments on the Phoenix Behavioral contract.

Plaintiff states that the agreed-to contract provides that if the full amount of each monthly payment is not paid on its due date, the Borrower is in default and the Note Holder may require payment immediately for both the Secured Note and the Unsecured Note. Further, the Note Holder may request all interest, with reasonable costs and expenses, including attorneys' fees. Plaintiff claims that she is owed the principal sum of \$209,000.00, interest charges of \$7,450.78, and late charges of \$1,465.36, for a total balance of \$217,916.14. This total is based on Defendant's default in payment of the Secured Note and Mortgage for Bibee. Plaintiff also asserts that she is owed the principal sum of \$125,000, interest charges of \$4,474.60, and late charges of \$2,127.04, for a total balance of \$131,601.64. This total is based on Defendant's default in payment of the Unsecured Note for Phoenix Behavioral. Lastly, Plaintiff states that Defendant and his entities have paid only \$25,000 of the \$725,000 negotiated sales price, and for this reason, was unjustly enriched.

On July 18, 2014, Defendant and his entities filed a counterclaim and soon thereafter, Plaintiff filed a motion to dismiss Defendants' counterclaim on August 12, 2014. Defendants filed a response to Plaintiff's motion to dismiss the amended counterclaim on September 25, 2014.

Plaintiff bases its motion on Superior Court Rules 12 and 9 for failure to state a claim and failure to plea with particularity (or so one must assume, as no sub-part of Rule 12 or Rule 9 was cited).

PROCEDURAL BACKGROUND

The Court notes that the Defendants in this case did not go through the proper channels to amend his counterclaim. The Defendants should have filed a motion to amend with this Court, pursuant to Del. Super. Ct. R. 15(a). “A party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served...”¹ The Plaintiff filed a motion to dismiss the Defendants’ counterclaim on August 12, 2014, and the Defendants filed an amended counterclaim on August 26, 2014, which was after Plaintiff filed a responsive pleading. “A party seeking to amend its pleading after a responsive pleading has been filed can do so ‘only by leave of the court or by written consent of the adverse party.’”² Although the defendants failed to follow proper procedure, the Plaintiff has not raised claims of “undue or demonstrable prejudice or bad faith by the moving party,” which leaves this Court to consider all papers filed by both Defendants and Plaintiff.³

STANDARD OF REVIEW

When deciding a motion to dismiss, all factual allegations in the complaint are

¹ Del. Super. Ct. R. 15(a).

² *Wilmington Sav. Fund Soc., F.S.B. v. Anderson*, 2009 WL 597268 (Del. Super. Mar. 9, 2009).

³ *Cartanza v. Lebeau*, 2006 WL 903541 (Del. Ch. Apr. 3, 2006).

accepted as true.⁴ If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied.⁵ That is, a motion to dismiss is decided on “whether a plaintiff may recover under any conceivable set of circumstances susceptible to proof under the complaint.”⁶ Consequently, dismissal will only be warranted when “under no reasonable interpretation of the facts could the complaint state a claim for which relief might be granted.”⁷ Stated differently, a complaint will not be dismissed unless it clearly lacks factual or legal merit.⁸

DISCUSSION

Plaintiff’s amended motion to dismiss the counterclaim fails to include any case law or statute to support its contentions, leaving the Court to do so on its own. Plaintiff asserts in its first motion to dismiss cause for Rule 12 (hereinafter “Rule 12”)⁹ and Rule 9 (hereinafter “Rule 9”)¹⁰ but in its response to the Amended Counterclaim, only discusses Rule 12. The Plaintiff merely states that pursuant to

⁴ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

⁵ *Id.*

⁶ *Id.*

⁷ *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super.).

⁸ *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

⁹ Del. Super. Ct. Civ. R. 12(b)(6).

¹⁰ Del. Super. Ct. Civ. R. 9(b).

Superior Court Civil Rules 12 and 9, it should be granted its motion to dismiss the Defendants' amended counterclaim in its entirety. However, this Court will look at the amended motion based on both Superior Court Rules 12 and 9.

I. Defendants' Count I (Fraud and/or Fraud in the Inducement)

Dismissal is appropriate only if it is reasonably certain "that the plaintiff could not prove any set of facts that would entitle him to relief."¹¹ Plaintiff argues that Defendants have failed to state a claim because it is "absolutely impossible for Plaintiff to have made any representation to [Defendants]."¹² Plaintiff alleges this is because "Plaintiff owned the businesses, and therefore made no representations to them [Bibee and Phoenix Behavioral] whatsoever." With this limited amount of reasoning behind Plaintiff's contention that Defendants have failed to state a claim, this Court, in taking all facts to be true in Defendants' Amended Counterclaim, must deny this portion of Plaintiff's motion as it currently reads.

The Defendant agrees that it entered into a contract with Plaintiff, but alleges in its amended counterclaim that Plaintiff is guilty of fraud and/or fraud in the inducement based on misrepresentations made to the Defendant to coax him to purchase the entities Bibee and Phoenix Behavioral.¹³ Defendant states that Plaintiff made several false representations and provides the dates and content of said

¹¹ *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. 1983).

¹² Plaintiff's Amend. Countercl., ¶ 4.

¹³ Defendants' Amend. Countercl. at 4.

representations in its amended counterclaim. First, the Defendant argues that within thirty days of closing, he discovered that the accounts receivable for Phoenix Behavioral were worth \$700,000 less than what was presented to him by the Plaintiff. He also alleges that the Plaintiff transferred funds from her personal account into Phoenix Behavioral in order to artificially inflate the value of the business. Because of the Plaintiff's material misrepresentations, the Defendant believes his damages are a direct and proximate result of the Plaintiff's alleged fraudulent activity. Looking at the facts in the light most favorable to the Defendant, the claims of fraud in the inducement do not clearly lack factual merit. For this reason, Defendants' Count I will not be dismissed.

Rule 9

Plaintiff's Motion to Dismiss the Amended Counterclaim pleads for dismissal under Rule 12 and 9 of the Superior Court Rules of Civil Procedure, but only details how the Defendants failed to state a claim. In the Plaintiff's original motion to dismiss, both Rule 12 and Rule 9 are cited generally as a way to dismiss Defendants' counterclaims. However, the only cause of action Plaintiff articulated to be dismissed under Rule 9 are Defendants' claims of misrepresentations (Count I or possibly II ((Intentional Misrepresentation))- not adequately articulated in the motion).

Rule 9 requires that the circumstances constituting fraud, negligence, or mistake be plead with particularity.¹⁴ In order to meet that requirement, a fraud claim must provide the time, place and contents of the false representations as well as the

¹⁴ Del. Super. Ct. Civ. R. 9(b).

identity of the person making the misrepresentation and what he obtained thereby.¹⁵ The purpose of the heightened pleading requirement is to ensure that the opposing party has notice of the claim and is able to prepare an adequate defense.¹⁶

In this case, Defendant alleged that the Plaintiff purposefully wanted to “induce Counterclaim-Plaintiffs to agree to be bound by the terms of the Bibee Assignment, the Bibee Note, the Mortgage, the Phoenix Assignment, and the Phoenix Note in order to receive a greater sum of money than if the true financial figures had been disclosed.”¹⁷ The motion further avers that Plaintiff knew that the misrepresentation would induce Defendant to purchase its various entities. The motion alleges that Plaintiff’s misrepresentations were made with the intent to facilitate the purchase of Phoenix Behavioral and Bibee.

The Defendants’ pleadings are relatively specific about the contents of the false representations and the identity of the person responsible for them, the Plaintiff. Defendant argues that when he began negotiations with the Plaintiff in 2013, the value of the accounts receivable for Phoenix Behavioral was \$750,000 and that gross annual revenues were at least \$1,000,000. This valuation was represented as accurate by the Plaintiff through the time of closing. It was not until thirty (30) days after the closing date of July 13, 2013 that the Defendant learned of the company’s true value.

¹⁵ *Nutt v. A.C. & S. Inc.*, 466 A.2d 18, 23 (Del. Super 1983).

¹⁶ *C&P Tel. Co. V. Chesapeake Utils. Corp.*, 436 A.2d 314 (Del. 1981).

¹⁷ Defendants’ Amend. Countercl. ¶ 31.

He learned that the accounts receivable for Phoenix Behavioral were \$300,000, and the annual revenues were only \$300,000.

II. Defendants' Count II (Intentional Misrepresentation)

“To plead a claim for fraud or intentional misrepresentation under Delaware law, a plaintiff must allege: (1) a false representation, usually one of fact, made by the defendant; (2) with knowledge or belief of its falsity or with reckless indifference to the truth; (3) with intent to induce action or inaction; (4) that plaintiff's response was taken in justifiable reliance on the representation; and (5) an injury resulting from such reliance.”¹⁸

Defendant argues that the Plaintiff intentionally concealed its true financial figures regarding its various entities, and in so doing, Defendant relied on Plaintiff's misrepresentations. Defendant alleges it has suffered damages based on such misrepresentations in the amount of \$225,000, which is partially based on the amount he has expended in order to keep the businesses afloat. Defendant has sufficiently stated a claim including the monetary amount of the misrepresentation and has stated the elements of the cause of action for intentional misrepresentation.

Plaintiff's Motion to Dismiss merely states that such misrepresentations were “impossible,” but does not address the issue further.” Therefore, Defendants' Count II is not dismissed.

¹⁸ *Alltrista Plastics, LLC v. Rockline Indus., Inc.*, 2013 WL 5210255 (Del. Super. Sept. 4, 2013) quoting *Van Lake v. Sorin CRM USA, Inc.*, 2013 WL 1087583, at *12 (Del. Super. Feb. 15, 2013).

III. Defendants' Count III (Civil Conspiracy to Commit Fraud, Fraud in the Inducement, And/Or Intentional Misrepresentation)

“Civil conspiracy is the combination of two or more persons or entities for an unlawful purpose or for the accomplishment of a lawful purpose by unlawful means, resulting in damage.”¹⁹ Civil conspiracy is not an independent cause of action in Delaware.²⁰ To be actionable, a civil conspiracy must embody an underlying wrong which would be actionable in the absence of the conspiracy. “The gravamen of an action in civil conspiracy is not the conspiracy itself but the underlying wrong which would be actionable absent the conspiracy.”²¹ The proof required to show civil conspiracy may be both through circumstantial as well as direct evidence.²²

In assessing Defendants’ claims that Plaintiff engaged in Civil Conspiracy to Commit Fraud, Defendants assert that Plaintiff conspired with her now deceased husband, Mr. Friedman, to hatch a plan to misrepresent the true financial figures of Phoenix Behavioral to induce Defendant to bargain for a higher purchase price. The Defendants believe the Plaintiff and her late husband committed the following acts in furtherance of the conspiracy: transferring funds to Phoenix Behavior from her

¹⁹ *Weinberger v. UOP, Inc.*, Del.Ch., 426 A.2d 1333, 1348 (1981), *rev'd on other grounds*, Del. Supr., 457 A.2d 701 (1983).

²⁰ *Phoenix Canada Oil Co. v. Texaco, Inc.*, D.Del., 560 F.Supp. 1372, 1388 (1983).

²¹ *Connolly v. Labowitz*, 519 A.2d 138, 143 (Del. Super. 1986) *quoting* *McLaughlin v. Copeland*, D. Del., 455 F. Supp. 749, 752 (1978), *aff'd* 3d Cir., 595 F.2d 1213 (1979).

²² *United States v. L.D. Caulk Company*, D.Del., 126 F.Supp. 693, 702 (1954) *quoting* *Connolly v. Labowitz*, 519 A.2d 138, 143 (Del. Super. 1986).

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personal account to inflate financial figures, and misrepresenting to the Defendant the true revenue of Phoenix Behavioral. Lastly, the Defendants also allege that the Plaintiff remained silent in light of a duty to correct her deceased husband's misrepresentations.²³ Defendant further alleges damages as a direct and proximate cause. Other than these statements, the Defendant does not supply the Court with any facts to further substantiate his claims.

The Defendant has stated the elements of the cause of action for civil conspiracy, and it would seem that his underlying crime would be that of the misrepresentations of fact by the Plaintiff. Because Defendant has alleged at least enough information to adequately state a cause of action, Count III of Defendants' Amended Counterclaim is not dismissed.

CONCLUSION

The Plaintiff's Motions to Dismiss Defendants' Counterclaim and Amended Counterclaim are denied.

IT IS SO ORDERED.

/s/ William L. Witham, Jr. _____
Resident Judge

WLW/dmh

²³ Defendants' Amend. Countercl. at 6.